will not decree specific performance at the suit of an infant, as his power of repudiation renders the court unable to enforce effectually its decree; *Flight* v. *Bolland* (1828) 4 Russ. 298; nor where one of the essential terms of the agreement sued on is of such a nature that equity cannot specifically enforce it and so cannot exact performance of both parties, *Roller* v. *Weigle* (D. C. 1919) 261 Fed. 250; *Ten Ecck* v. *Manning* (1893) 52 N. J. Eq. 47, 27 Atl. 900; *Welty* v. *Jacobs* (1898) 17 Ill. 624, 49 N. E. 72, yet where the vendor alone has signed a memorandum sufficient to bind him under the Statute of Frauds, equity will decree specific performance at the suit of the purchaser, as by making the defendant's performance conditioned on that of the plaintiff, the court protects both parties, and completely carries out the agreement between them. *Mason* v. *Decker* (1878) 72 N. Y. 595; *Smith* v. *Wilson* (1901) 160 Mo. 657, 61 S. W. 597. Analogous to this is a suit for specific performance against the vendor by the assignee of the vendee, where a similar decree would compel the defendant to do what he agreed to do, and give him the compensation agreed upon for his performance. *Moore* v. *Gariglietti* (1907) 228 Ill. 143, 81 N. E. 826. While there are a few early New York cases so holding, *Dodge* v. *Miller* (1894) 81 Hun 102, 30 N. Y. Supp. 726; see *Jones* v. *Lynds* (1838) 7 Paige Ch. 301 (*semble*), the trend of recent New York decisions has been to deny relief in such a case, on the ground that since the vendor could not compel specific performance by the assignee, unless the latter had assumed his assignor's obligation to purchase or there were a novation, see *Hugel* v. *Habel* (1909) 132 App. Div. 327, 329, 117 N. Y. Supp. 78, mutuality demands that specific relief be denied the assignee. *Genevetz* v. *Feiering* (1910) 136 App. Div. 736, 121 N. Y. Supp. 392; *Dittenfass* v. *Horsley* (1917) 177 App. Div. 143, 163 N. Y. Supp. 626, aff'd 224 N. Y. 560, 120 N. E. 861; *Levin* v. *Dietz* (1909) 194 N. Y. 376, 87 N. E. 454 (*semble*); *Wadick* v. *Mace* (1908) 191 N. Y. 1, 83 N. E. 57 (*semble*). The instant decisions, in refusing to follow the New York rule, as laid down by the higher courts, have reached a result that is both desirable and sound in principle.

WARRANTY—QUALITY OF GOODS—WHETHER JUDGMENT AGAINST VENDEE IS BINDING ON VENDOR.—The plaintiff sold a horse, purchased from the defendant, to one Walters, giving the same warranty of soundness as he had received from the defendant. Walters sued the plaintiff for breach of warranty and recovered, the defendant refusing to defend the suit after notice from the plaintiff. In an action by the plaintiff to recoup, the jury found that the horse was sound at the time the defendant sold him, but judgment was entered for the plaintiff *non obstante veredicto*. *Held*, on appeal, for the defendant. *Booth* v. *Scheer* (Kan. 1919) 185 Pac. 898.

It is well settled that a subvendee cannot recover from the original vendor on a breach of warranty but must look to the one from whom he purchased. *Thisler* v. *Keith* (1898) 7 Kan. App. 363, 52 Pac. 619; *Nelson* v. *Armour Packing Co.* (1905) 76 Ark. 352, 90 S. W. 288; but see *Childs* v. *O'Donnell* (1891) 84 Mich. 533, 538, 47 N. W. 1108. The original vendee may in turn recoup from his vendor upon a like warranty made to him. Williston, Sales, § 244. The decision in the instant case depended not on whether a warranty of quality runs or not—as was apparently the basis of the decision—since a subvendee was not suing, but, as Mason, *J.*, pointed out on p. 898, on whether the defendant, having notice of the suit against his vendee was under a

duty to defend it or be bound by that judgment. In the case of warranty of title to personalty it is generally established that a vendor after notice of suit against his vendee by one claiming a superior title, must defend or the judgment will be conclusive against him in an action by his vendee for recoupment. *Boyd* v. *Whitfield* (1858) 19 Ark. *447; *Bevan* v. *Muir* (1909) 53 Wash. 54, 101 Pac. 485; see *Jordan* v. *Van Duzee* (1917) 139 Minn. 103, 165 N. W. 877; *Smith* v. *Williams* (1903) 117 Ga. 782, 45 S. E. 394 (*semble*). However, where a warranty of quality is concerned that doctrine has not been applied and it has been held in the few cases that have involved this point that the original vendor is not bound by a judgment against his vendee, *Smith & Welton* v. *Moore* (1875) 7 S. C. 209, though the judgment against the vendee may be *prima facie* evidence of the issue in an action against the original vendor. *Reese* v. *Miles* (1897) 99 Tenn. 398, 41 S. W. 1065. The reason is a real one, since in the suit against the vendee the jury decides only that there was a breach at the time of the resale, while in the action by the vendee the jury must consider the warranty as of the time of the original sale. *Smith & Welton* v. *Moore, supra.* The quality of an article such as eggs, see *Reese* v. *Miles, supra,* or of cotton, *Smith & Welton* v. *Moore, supra,* or the soundness of a horse, may change from day to day, and hence the judgment of the jury in the first action cannot be conclusive in the second action. But in those cases where the quality of the article does not change, there seems to be no good reason why the judgment in the first case should not be conclusive. The law on this point being yet unsettled, it is suggested that the distinction taken between warranties of title and of quality of personalty should be applied only where the quality is subject to change and not where it remains stable. The instant case both on authority and principle seems well decided.

WATERS AND WATERCOURSES—OBSTRUCTION OF DIFFUSED SURFACE WATER BY LOWER OWNER.—The defendant, a lower owner, erected a dike which obstructed the flow of surface waters from the upper lands, causing the water to back upon the plaintiff's land to the injury of his crops. In an action for damages, *held,* the defendant was privileged to ward off diffused surface waters even to the damage of the upper owner. *Johnson* v. *Leazenby* (Mo. 1919) 216 S. W. 49.

Although a lower owner may not obstruct the flow of surface waters which come onto his land in a stream or natural watercourse, *Miller* v. *Eastern Ry.* (1915) 84 Wash. 31, 146 Pac. 171; *Skinner* v. *Gt. Northern Ry.* (1915) 129 Minn. 113, 151 N. W. 968, in most jurisdictions he may protect his lands from diffused surface waters, even to the damage of the upper proprietor. *Goll* v. *Chicago & A. Ry.* (1917) 271 Mo. 655, 197 S. W. 244; *Harvie* v. *Caledonia* (1915) 161 Wis. 314, 154 N. W. 383; *Gibson* v. *Duncan* (1915) 17 Ariz. 329, 152 Pac. 856; Gould, Waters (3rd ed.) § 275. No easement of flowage is gained because of the lower owner's past submission. *Clay* v. *Pittsburgh* (1905) 164 Ind. 439, 73 N. E. 904. Some jurisdictions, however, influenced by the civil law, regard the lower lands as servient to the upper and bound to receive the natural flow of diffused water therefrom; *Johnson* v. *Marcum* (1913) 152 Ky. 629, 153 S. W. 959; *Lamb* v. *Stone* (1917) 178 Iowa 1268, 160 N. W. 907; *Galbreath* v. *Hopkins* (1911) 159 Cal. 297, 113 Pac. 174 (*semble*); 1 Wiel, Water Rights (3rd ed.) § 348; and so long as the volume is not increased, the upper proprietor is permitted to divert the diffused waters into an artificial